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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

UNITED STATES OF AMERICA *ex rel.* MURAD A. SUTTON,

Relator-Appellant,

against

JAMES MULCAHEY, United States Marshal for the Southern District of New York, and EDWARD E. THOMPSON, Warden of the Federal House of Detention,

Respondents-Appellees,

v.

JACK MENASHE,

Respondent-Impleaded-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE A. FERRIS,
Attorney for Respondent
Impleaded Appellee.

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Statement of the Case

This is a collateral proceeding initiated by a writ of habeas corpus. In the title of the writ the name of the respondent does not appear (184). An application was made on December 23, 1947, by the United States Attorney to introduce the respondent as a party to the proceeding (226-8). The motion was granted by Judge God-

dard on January 6, 1948 (233-7). In the main case the respondent was the plaintiff and the defendants, the relator individually and as trustee of Sutton Trusts, and his wife, Adele Ancona Sutton. The action was to procure the appointment of a permanent ancillary receiver and other relief.

On January 10, 1947, there was presented to Judge Rifkind a set of papers including the complaint in the main suit and an affidavit requesting the appointment of a temporary ancillary receiver. Judge Rifkind appointed Mr. Oseas (p. 202). The appellant and his wife moved by order to show cause dated January 17, 1947, for dual relief: to dismiss the case and, as well, to vacate the order of Judge Rifkind dated January 10, 1947. The particular language of the order to show cause in so far as it is here pertinent read:

> "why an order should not be made and entered herein dismissing the above entitled action for lack of jurisdiction over the subject matter and controversy thereof, and over the person of the defendants, Murad A. Sutton and Adele Ancona Sutton, for the reason that there is no diversity of citizenship, between the plaintiff and the defendants, Murad A. Sutton and Adele Ancona Sutton are residents of the same state, to wit, the State of New York, and vacating the ex parte order dated Juanary 10, 1947, appointing I. B. Oseas, as ancillary receiver herein."

In a memorandum submitted by the appellant and his wife it was conceded that diversity of citizenship was alleged in the complaint. This was the phraseology:

> "The defendants, Sutton, move to dismiss the complaint on the ground that this court has no juris-

> diction to entertain the same. Jurisdiction of this court is claimed in the complaint by reason of diversity of citizenship. (Paragraphs 1-3 of complaint.)"

Judge Hulbert heard the argument, reserved decision and wrote an opinion reported in 71 Fed. Supp. 103, denying the motion in all respects.

On February 10, 1947, Adele Ancona Sutton served her answer denying paragraphs "1" and "3" of the complaint which alleged diversity and asserted four separate defenses. The first and fourth are of particular pertinence now. The first defense read:

> "That this defendant and the defendant, Murad A. Sutton, are citizens and residents of the State of New York, and reside in the city of Long Beach, County of Nassau, State of New York."

The fourth defense read:

> "It is not true as alleged in said complaint that defendant is a resident and inhabitant of the Territory of Hawaii and defendant avers that said defendant was at the commencement of this suit and now is a citizen and resident of the State of New York, of which state the plaintiff was at the commencement of this suit and now is a citizen and resident."

The appellant served his answer on April 8, 1947. It contained the same denials and the same separate defenses with regard to jurisdiction.

Orders were procured, over bitter opposition, compelling Sutton and his wife to submit to examination before trial. The objective always was, as indeed the pur-

pose of the respondent is presently, to discover assets in this area belonging to the partnership described in the complaint so that they might be turned over to the ancillary receiver. Almost every device known to astute and resourceful counsel was employed to block, defeat and frustrate the respondent and prevent the development of the appropriate facts. There were innumerable applications before almost every judge below and, in each instance, the Suttons were defeated.

Recognizing that the respondent was gradually forcing him and his wife to disclose the disposition of partnership assets abstracted from Hawaii and transported to this country, the appellant and his representation conceived a plan. In an endeavor to terminate the examination that was such a sharp thorn in their sides they, in July, 1947, served a paper entitled "Consent to judgment" in which they specifically withdrew their answers and agreed that judgment might be entered in favor of the plaintiff, the respondent here (209).

At page 2 of the appellant's petition, it is stated that a judgment was entered "on consent" on July 31, 1947, appointing Mr. Oseas permanent ancillary receiver. That is not quite accurate. True, it was on the consent of the appellant and his wife but it was not with the consent of the respondent. Indeed, as the appellant's prior counsel, Mr. Begun, will attest, we opposed the application for leave to enter judgment with great vigor. Judge Holtzoff, however, entertained the view that he had no discretion in the matter and that if the defendants wished to consent to judgment in favor of the plaintiff for the relief demanded

in the complaint there was nothing he could do about it. The judgment was prepared on the stationery of the attorneys for the appellant and, after the recitals, read in part:

> "NOW, THEREFORE, it is on motion of Begun Brothers, attorneys for the defendants, Murad A. Sutton, Murad A. Sutton, as trustee of Sutton Trusts, and Adele Ancona Sutton,
>
> ORDERED, ADJUDGED AND DECREED, that the plaintiff is granted judgment against the defendants, Murad A. Sutton, Murad A. Sutton as trustee of Sutton Trusts, and Adele Ancona Sutton, for the relief demanded in the complaint, * * *."

There followed other provisions appointing Mr. Oseas permanent ancillary receiver, enjoining a disposition of the property, commanding the parties to deliver "forthwith" to the ancillary receiver all partnership assets of every kind, nature and description and the like.

But the glee of the appellant was short-lived. An application was made by the respondent before Judge Medina to direct the Suttons to submit to examinations before the Special Master in a proceeding supplemental to the judgment. Later in this brief we will discuss the arguments presented by the appellant to Judge Medina and his disposition of them. In the end Judge Medina granted the motion by order dated September 11, 1947. An appeal was taken to the Circuit Court. Application was made before Judge Medina for a stay. That Judge stated very frankly that in his opinion the appellant was "stalling" (216). He granted a temporary stay for the sole purpose of

enabling the appellant to move for a stay in the Circuit Court. When the matter was argued there, the stay was denied from the bench upon the ground that the order was not appealable.

On November 21, 1947, Judge Coxe signed an order punishing the appellant for contempt (125-35). Sutton was granted the opportunity to purge himself by testifying "fully and not evasively, with respect to the matters specified in the order of Judge Medina dated September 11, 1948" (135).

The appellant declined so to testify and made no application to be relieved of the contempt.

On December 6, 1947, present counsel for the appellant moved for a reargument. That motion was denied by order of Judge Coxe on December 12, 1947 (204). On December 15, 1948, Judge Coxe signed the commitment order (204).

No appeal was ever taken from the contempt order, the order denying the reargument or the commitment order.

On December 11, 1947, the appellant appeared before the Special Master with his attorney, Mr. Donoghue. The sole contention made at that time was that Mr. Ferris, the attorney for the respondent, was disqualified from further interrogation because of an alleged adverse interest (149). As Mr. Donoghue put it:

> "Mr. Donoghue: Our position is that Mr. Ferris is not qualified to ask any questions; therefore, I think the record clearly shows that Mr. Sutton's

position is that he won't answer any questions or do anything emanating from the propounding of a question by Mr. Ferris." (165)

Mrs. Sutton was called to the stand and declined to answer for the same reason (177).

The record discloses, however, that the appellant refused to answer questions even when put to him by the Special Master. Moreover, he disobeyed the subpoena *duces tecum* issued out of the District Court. Manifestly, the totally unfounded claim of disqualification by Mr. Ferris as the reason for failing to answer questions was made in the worst possible faith. It was merely an additional device to prevent a revelation of the truth.

Sutton has been at liberty under a bond. At no time did he assert inability to pay the fine.

POINT I

Habeas corpus does not lie because the jurisdiction of the Court was directly assailed in the main case and resulted unfavorably to the appellant and he is therefore precluded from renewing the attack collaterally.

In an effort to convince this Court to accept a review the appellant pretends that multitudinous problems of unparalleled complexity are presented. Actually the single issue is this: Where a defendant challenged the jurisdiction of the District Court and lost and had the opportunity for further assault in the original court and on appeal,

may the ensuing judgment be collaterally attacked on jurisdictional grounds through the medium of habeas corpus.

Judge Swan wrote in this case:

> "Where the question of jurisdiction has been litigated that issue is ordinarily immune from collateral attack."

Concurring, Judge Clark observed:

> "I guess Judge Swan does more nearly state the current view."

Our research discloses an unbroken line of decisions by this Court in support of Judge Swan's thesis.

Matter of Cuddy, 131 U. S. 280, 285;
Craig v. *Hecht*, 293 U. S. 255, 277;
Stoll v. *Gottlieb*, 305 U. S. 165;
Chicot v. *Baxter*, 308 U. S. 371;
Sunal v. *Large*, 332 U. S. 174, 179;
Sherrer v. *Sherrer*, 92 Law Ed. Vol. 92, pp. 1055, 1060, 1062, 1072.

Illustrative of our contention that this Court has long enunciated and repeatedly adhered to the sound doctrine of preclusion from collateral attack we quote chronologically pertinent extracts from the foregoing authorities.

In *Matter of Cuddy, supra*, this was written:

> "And in *Galpin* v. *Page*, 84 U. S. 18, Wall. 350, 365 (21: 959,962), the court said: 'It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is

> presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also.' The general rule that, unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a Circuit or District Court of the United States—their jurisdiction being limited by the Constitution and Acts of Congress—has no application where the judgments of such courts are attacked collaterally."

Not only has a habeas corpus proceeding been recognized by the courts as collateral but the appellant in this very proceeding pushed the doctrine to its extreme. Neither the respondent nor his attorney was notified of the release of the appellant in the custody of his attorney (194). The respondent was not, as already noted, named in the title. Indeed, in the memorandum submitted to Judge Clancy the appellant advised the Court at page 4:

> "It is assumed that the attorney for Menashe will attempt to argue upon the return of this writ. We respectfully point out to this learned court that the Federal Rules of Procedure make no provision for the participation of a third party or his attorney in this ex parte proceeding."

Nevertheless, the respondent was brought into the proceeding. He was deemed a necessary party both by Judge Rifkind and Judge Goddard. It seems quite plain, therefore, that the appellant is attempting, in a purely collateral proceeding, to attack the jurisdiction of the Court

in the principal case. In this view all the judges below united.

In *Stoll* v. *Gottlieb, supra,* this was written:

> "After a Federal Court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.
>
> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

In *Chicot* v. *Baxter, supra,* this was written:

> "The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District

> Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally." (p. 376.)

And again at page 377:

> "*The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata* in a collateral action. Stoll v. Gottlieb, 305 U. S. 165, 171, 172, 83 L. Ed. 104, 108, 109, 59 S. Ct. 134, 38 Am. Bankr. Rep. (NS) 76." (Italics ours.)

In *Sunal* v. *Large*, supra, the Court said:

> "Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, habeas corpus is increasingly denied in case an appellate procedure was available for correction of the error" (179).

The latest exposition by this Court is contained in *Sherrer* v. *Sherrer, supra.* The following excerpts seem conclusive:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine

> of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. The reasons for this doctrine have frequently been stated.
>
> • • •
>
> If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own."

On the same page this Court noted "the considerable modern development of the law with respect to finality of jurisdictional findings."

Apparently on the question now under discussion this Court appears in complete agreement. Mr. Justice Frankfurter, in his dissenting opinion in the *Sherrer* case, wrote:

> "*Res judicata* forecloses relitigation if there has been an opportunity to litigate once, whether or not it has been availed of or carried as far as possible, Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317, 41 Am. Bankr. N. S. 508. And it applies to questions of jurisdiction of subject matter as well as to that of persons. Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134, 38 Am. Bankr. N. S. 76; Treinies v. Sunshine Min. Co., 308 U. S. 66, 84 L. Ed. 85, 60 S. Ct. 44."

The Circuit Courts have throughout, so far as we have been able to discover, followed a course charted by

this Court. Thus in *Bostwick* v. *Baldwin,* 133 Fed. (2) 1 (CCA 5, cert. den. 87 L. Ed. 1699) the Court wrote:

> "This being a collateral attack upon the judgment, appellants' point is well taken if, but only if, the record on its face shows: *not merely that the requisite diversity of jurisdiction does not affirmatively appear but that it did not and could not exist,* Freeman on Judgment, Vol. 1, p. 722, Cyc. Federal Procedure, Vol. 1, p. 152; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; *and that the court did not find and adjudicate that it had jurisdiction.* Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329; Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104." (Italics ours.)

The prevailing opinions of Judges Swan and Clark are in precise accord with prior decisions of the same court. For illustration, in *Sorenson* v. *Sutherland,* 109 Fed. (2nd) 714, Judge Augustus N. Hand wrote as follows at page 718:

> "The case at bar falls clearly within the rule of Stoll v. Gottlieb and of the Chicot County decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge Caffey, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge Caffey that the material facts were 'jurisdictional'; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word 'jurisdiction' the parties to the previous trial could scarcely have raised the issue of right to sue more squarely."

And at page 719:

> "But in Chicot County Drainage District v. Baxter State Bank, supra, an earlier decision was held binding even though the question of jurisdiction had not been raised at the first trial, *because it might have been raised there and was necessarily involved.*" (Italics ours.)

And in *U. S.* v. *Jaeger,* 117 Fed. (2nd) 483, this was written:

> "It is now well settled that on contempt proceedings no attack can be made on the regularity, correctness, or validity of the original order. Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419, affirming In re Oriel, 2 Cir., 23 F. 2d 409, 413; In re Siegler, 2 Cir., 31 F. 2d 972; In re Arctic Leather Garment Co., supra; Id., 2 Cir., 106 F. 2d 99; cases collected 3 Moore's Collier on Bankruptcy, 14th Ed., 535-537. A like rule applies to habeas corpus proceedings; they cannot be used to review, as on appeal, the court action which has led to the commitment order. Craig v. Hecht, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293; affirming Ex parte Craig, 2 Cir., 282 F. 138; Ex parte Kearney, 7 Wheat. 38, 20 U. S. 38, 5 L. Ed. 391; United States ex rel. Paleais v. Moore, 2 Cir., 294 F. 852.
>
> Relator has appealed from neither the commitment nor the contempt order; he therefore can raise here the issue of jurisdiction only. *Yet he had opportunity to and did raise that issue in the prior proceedings, and the court found against him. Even if we assume that the court was acting upon erroneous grounds as indicated above, yet Stoll* v. *Gottlieb,* 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, *makes it clear that the matter is settled against collateral attack.*" (Italics ours.)

When the Chief Justice of this Court was sitting in the United States Court of Appeals for the District of Columbia he wrote in *Warring* v. *Colpoys*, 122 Fed. (2nd) 642 at p. 644:

> "This is a habeas corpus proceeding, a collateral attack upon a previous judgment of the District Court, accepted at the time as final. It is increasingly evident that 'jurisdiction' in the normal case is not subject to collateral attack. While habeas corpus is regarded more liberally than most forms of collateral attack, it is not to be used as an appeal or a writ of error."

Of all the cases that we have been able to discover dealing with similar questions, we state with confidence that this is the strongest for the respondent. The authorities unite in the view that a collateral attack may not be leveled at the jurisdiction in the main case either where the assault has been made and repulsed or where the opportunity existed for the attack. In this case there were both the attack and the opportunity for further attack.

Rule 12 of the Federal Rules of Civil Procedure provide how a challenge may be made to the jurisdiction:

> "(b). How PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted."

Under subdivision "(h)" entitled "Waiver of Defenses" this is the exception:

> "* * * except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

Rule 15(b) provides that where the question of jurisdiction is presented at the trial the court may conform the pleadings to the proof and generally may proceed with great liberality.

Before discussing what actually transpired here, it may be well to consider some of the leading cases on the subject of the challenge to the jurisdiction.

In *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, the Court wrote at page 186:

> "In *North Pacific S. S. Co.* v. *Soley*, 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87, supra, the suit was in equity and the question was whether the jurisdictional amount was involved. This plaintiff's allegation to that effect was denied by the answer. Upon hearing the evidence offered by the complainant, and that of the defendant, the trial court held that the jurisdictional amount was not involved and dismissed the suit. On direct appeal to this Court, under the former practice where jurisdictional questions alone were presented, the Court said: 'The objection that jurisdiction to entertain the suit did not exist is one which may be taken by answer. Anderson v. Watt, 138 U. S. 694, 34 L. Ed. 1078, 11 S. Ct. 449. Indeed,

> under Sec. 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jursidiction upon the facts presented, and when brought directly here, it is the duty of this court to review the decision *upon the testimony* as one presenting a jurisdictional question.' " (Italics ours.)

Concluding, the Court wrote at page 189:

> *"If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner,* he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence." (Italics ours.)

To the same effect, see:

> *Thomson* v. *Gaskill,* 315 U. S. 442, 446;
> *Kvos* v. *Associated Press,* 299 U. S. 269, 278.

The appellant did challenge the jurisdiction. He lost before Judge Hulbert. Whether or not he had the right to appeal from so much of the order as denied the motion to dismiss the complaint, the fact is that he did have the right to appeal from that part of the order that denied the motion to vacate the receivership.

In 28 U. S. C. A., Sec. 227, entitled "Appeals in Proceedings for Injunctions and Receivers", there is this provision:

> "Where, upon a hearing in a District Court, or by a Judge thereof in vacation, an injunction is granted, continued, modified, refused or dissolved by interlocutory order or decree, or an application to dissolve or modify an injunction is refused, *or an interlocutory order or decree is made appointing a receiver*, * * *."

It is provided that an appeal may be taken within thirty days after the entry of the order.

That the order was appealable see *Maxwell* v. *Enterprise*, 131 Fed. (2nd) 400 (C. C. A. 3); *Pacific Northwest Packing Co.* v. *Allen*, 109 Fed. 515, 548 (C. C. A. 521).

The appellant preserved his right. He interposed an answer specifically denying the allegations of diversity and asserting not one but two affirmative defenses alleging lack of diversity. The case received a number on the trial term calendar and would have been reached in regular course. Whatever the animating reasons the fact does remain that the appellant precluded the Court from ascertaining the facts bearing on the question of diversity and the respondent from introducing appropriate evidence.

It was the appellant who withdrew his answer so that the denials and defenses disappeared. It was the appellant, over the objection of the respondent, who insisted that judgment be entered in favor of the plaintiff and against him for the relief demanded in the complaint. True, he thought that the termination of the action would

automatically prevent a continuation of the examination. He was wrong. Judge Medina decided against him. Having gambled unsuccessfully he now asks the Court, in effect, to reinstate his answer and to place him in the position he occupied before he withdrew his answer and consent to judgment.

Thus the appellant made an unsuccessful challenge and himself destroyed the opportunity for further challenge. The authorities cited indicate that the Court, at the trial, may take proof on the question of diversity even by "suggestion" or upon its own motion. But how can the appellant, who, by his own act, deprived the respondent of the chance to submit his proof, profit by such a deliberate election.

If the appellant had answered and admitted the allegations of diversity in the complaint we doubt not that no issue would have been created. Is there not a greater admission when an answer containing denials and affirmative defenses is withdrawn?

In the appellant's brief much is made of the well recognized doctrine that lack of jurisdiction in the Federal Court cannot be waived. In the first place, that applies to a direct proceeding. Indeed, if the principal case had been tried and the appellant had lost and appealed from the judgment of the Court, the Circuit Court, of its own motion, might have scrutinized the record for jurisdiction. Collaterally a different question is presented because now there is "a presumption" in favor of the judgment which the unsuccessful attack promotes to "res judicata".

Here the position of the respondent is infinitely more powerful than in the usual case. Not merely did the

appellant acquiesce in the jurisdiction by silence but, on the contrary, he took an affirmative step. He, in effect, informed the Court that he was convinced of its jurisdiction, withdrew his denials of diversity, withdrew his defenses of lack of diversity and asked the Court to enter judgment in the case—thereby conceding that the Court had the power and the right so to do.

Of course if the 1940 amendment to 28 U. S. C. A. Sec. 41 (1) is valid there is no problem at all because then jurisdiction will, concededly, be manifest on the face of the complaint. It is affirmatively alleged that one of the parties was a citizen of the State of New York and the others of the Territory of Hawaii. The argument in this point has been predicated upon the assumption that doubt as to constitutionality does exist which will be resolved by this court in the case now pending before it (*National Insurance Company of the District of Columbia* v. *Tidewater Transfer Co. Inc.*, Docket 640).

Our contention has been throughout, and two of the Judges of the Circuit Court agree, that without regard to the correctness of Judge Hulbert's decision on the jurisdictional point, the appellant is permanently blocked from collaterally attacking the judgment.

The Dissenting Opinion of Judge Frank

We have always harbored the greatest deference for the dissenting judge. We are persuaded, however, that in this instance he has totally failed to appreciate the unswerving uniformity of this Court with respect to the doctrine of collateral attack and, as well, the catastrophic consequences of the views he seems to espouse.

The theory of the prevailing judges is correctly presented by Judge Frank when he writes:

> "My colleagues reason that Sutton was barred from such direct or indirect attack (1) because he had previously neglected to take a timely appeal from one or the other of two earlier appealable interlocutory orders (appointing, respectively a temporary and a permanent ancillary receiver) and (2) because on such a previous appeal, he could have raised the jurisdictional issue."

It is perfectly clear that when Judge Hulbert denied the application to vacate the temporary receivership and sustained the jurisdiction of the District Court an order, valid on its face, had been entered. A court of competent jurisdiction had declared that the case was properly in its court. That Sutton had abundant opportunity to appeal and to pursue the attack cannot be gainsaid. In the language of Judge Clark:

> "And it must be conceded that Relator did have plenty of opportunity to continue upon appeal the issue he had already raised below * * *."

The case continued in normal course, a judgment was entered and no appeal was taken from that. We doubt whether any lawyer could be discovered in whose mind there would lurk the faintest suspicion of the validity of such a judgment regularly recorded in the Clerk's docket.

Judge Frank seems to propose a new doctrine—a doctrine that courts and parties and the public should assume that all judgments are infected with doubt. That, of course, would be completely destructive to the inesti-

mably valuable element of certainty in judgment. A Damoclean sword would be eternally suspended over each judgment. And why? Because some day, perhaps a year or five years later, a defendant might feel, what Judge Frank is pleased to call "the bite".

This is truly a revolutionary philosophy! A judgment will now be valid, if Judge Frank is correct, only until a defendant decides that enforcement has proceeded far enough. Or, as the dissenting judge phrases it, until the judgment ceases to be "innocuous."

Suppose a plaintiff were to sue for a substantial sum and the defendant, attacking the jurisdiction, were defeated. He may appeal but rejects the chance. Apparently a valid judgment has been entered. Assume further, that defendant is judgment-proof and therefore indifferent. If he acquires affluence with the fulness of time he will probably then feel "the bite". The judgment creditor will demand his money. Should the defendant now be permitted collaterally to challenge the judgment and ask for a reconsideration of the jurisdictional question. Such a result, which Judge Frank seems to advocate, would sow chaos and cast a pall of doubt over innumerable Federal judgments.

The learned dissenting judge speaks of "a shocking result". But Sutton had his day in court on the jurisdictional question. He has had not one but three lawyers. The record is black with his efforts to avoid accounting to his partner for demonstrated violations of trust. At this stage, to allow Sutton to escape paying to the receiver the amount of partnership assets which Judge Coxe found

should minimally be turned over (by resorting, at best, to rehashed technicalities) would, indeed, be "a shocking result".

Judge Frank devotes considerable space to a discussion of Sutton's right to appeal from the contempt order. Admittedly he did not appeal. Judge Frank believes that the failure to appeal should be excused. We are unaware of any statute or decision equating a habeas corpus with the total absence of an appeal.

Even so, we are unable to comprehend how the appellant would be aided. The contempt decision occurred after the judgment, for wilful disregard of an order made subsequent to the judgment. Once again Sutton would be barred from collateral attack. He would be relegated to the merits of the contempt.

The *Sherrer* case was decided by this Court after Judge Frank wrote his opinion. That, together with *Sunal* v. *Large*, seems decisive.

POINT II

The Circuit Court of Hawaii is a federal legislative court even though it is not a federal constitutional court and, accordingly, no diversity of citizenship was necessary in the action for the appointment of an ancillary receiver.

The whole argument of the appellant stems from some language in *Mitchell* v. *Maurer*, 293 U. S. 237, at page 243. That language is set forth at page 104 of the opinion of Judge Hulbert, in 71 Fed. Supp. 103.

It seems to us that the appellant labors mightily to establish that the Hawaiian court is not "a court of the United States" but to little avail. He is bogged down in a morass of confusion and misapprehension. Apparently his starting point is this sentence of Judge Brandeis in the Mitchell case:

> "Obviously such an application is not ancillary to any proceedings *in any Federal Court.*"

The appellant has assumed the task of demonstrating to this Court that the Circuit Court of Hawaii does not fall within the classification of "any Federal Court." Without analyzing all of the authorities he cites, we think the Court will, upon investigation, reach this conclusion: There are two types of Federal Courts, constitutional and legislative. When the authorities refer to a particular court as not "a court of the United States" they are usually analyzing a certain statute. It is frequently found that it was not the intention of Congress to refer to a constitutional court for various assigned reasons. By "constitutional courts" is intended those courts referred to in Article III of the United States Constitution. But Judge Brandeis was not speaking of constitutional courts. He said "any Federal court." The problem is then, not whether the Circuit Court of Hawaii is a court of the United States in the constitutional sense but whether it falls within the category of any Federal court at all.

It seems to be conceded that in *McAllister* v. *United States*, 141 U. S. 174 (p. 21 of appellant's brief) a distinction was drawn between the two types of courts we have

mentioned. At page 27 of the appellant's brief there is a quotation to be found at page 184 of the *McAllister* case. Unfortunately the quotation is neither correct nor complete. In the appellant's brief, after the words "are not courts of the United States" there is placed a period. But in the volume itself there is no period. Indeed, there is no punctuation at all and the following language is added: "created under the authority conferred by that article" (referring to the third artitcle of the Constitution).

Thus, it is clearly indicated that the Court in the McAllister case was referring to constitutional courts and did not say that legislative courts are not courts of the United States in any sense.

A much later case was *Ex Parte Bakelite*, 297 U. S. 438. There the Court divided Federal courts into constitutional and legislative courts and wrote at page 459:

> "In creating courts for some of the territories Congress failed to include a provision fixing the tenure of judges; but the courts became legislative courts just as if such a provision had been included."

And further, at page 460:

> "Another feature to which attention was given is the denomination of the court as a United States Court. That the court is a court of the United States is plain; but this is quite consistent with it being a legislative court."

In commenting upon the *Bakelite* case this was written in 43 Harvard Law Review, page 894:

> "But decisions of the Supreme Court, culminating at the last term in Ex Parte Bakelite Corp. recognize

> *two classes of Federal courts* 'constitutional court' created pursuant to clauses above quoted and 'legislative court' created in the exercise of other legislative powers."

To the same effect see

24 Illinois Law Review 820.

Territorial Courts are legislative courts of the United States, subject to the plenary power and control of Congress.

Analysis of the Organic Act (Act of April 30, 1900, 31 Stat. 141) makes it clear that not only does Congress possess plenary power over territorial Courts, but that it has exercised this power over Circuit Courts of the Territory and has conferred, defined and limited their jurisdiction.

In *Mo Hock Ke Lok Po* v. *Stainback*, 74 Fed. Supp 852, the Court wrote at page 859:

> "There can be no doubt that Congress has paramount and plenary authority to legislate in all matters appropriate to the people of the territory of Hawaii-Inter-Island Steam Nav. Co. v. Territory of Hawaii, 305 U. S. 306, 59 S. Ct. 202, 83 L. Ed. 189."

Legislative Courts are Courts of the United States in the sense that they were created by Congress under authority of the Constitution. This is true whether the particular legislative court in question is the United States Court of Claims or a Territorial Court. This is uniformly recog-

nized by all legal digesting systems. Thus 20 Federal Digest 255, Title VII, under "Courts," is set up like this:

VII. United States Courts

G. Supreme Court.
H. Circuit Court of Appeals
I. Circuit Court
J. District Courts
K. Territorial and Provisional Courts
L. Courts of District of Columbia
M. Courts of Claims.

Territorial Courts are "Courts of the United States" as that term is used in the Seventh Amendment to the Constitution. See United States Constitution, Revised and Annotated, where it is said, at page 693:

"To What Courts Applicable.

This amendment applies only to courts sitting under the authority of the United States, including courts in the Territories and the District of Columbia. It does not apply to a State court even where it is enforcing a right created by Federal statute; the court in such case still derives its authority as a court from the State."

Conclusion: The Hawaiian Court is a federal legislative court. It appointed a receiver on consent and diversity was therefore unnecessary in the ancillary suit below.

POINT III

The orders of Judge Coxe, punishing the appellant for contempt and commiting him to jail, and of Judge Medina directing an examination supplemental to judgment, are not presently reviewable.

The appellant, in his Points 2 and 3, is grossly inconsistent. He admits that he has not appealed from Judge Medina's order or any one of the orders of Judge Coxe. He argues that they were not appealable. In the case of Judge Medina's order the Circuit Court so held. The papers in support of and in opposition to the motions culminating in such orders are not in this record. In *U. S.* v. *Jaeger,* 117 Fed. (2d) 483, the learned Court below expressly held that habeas corpus could not be used to review a contempt order. It would be unfair, not merely to the respondent, but to the Judge who believed his order was correct, to consider the merits in the absence of an appeal or any papers in the record.

Apart from the lack of power, this Court would, we are persuaded, concur with the dispositions below on the merits. The adversion to Rule 16 of the Civil Rules of the District Court is pointless. The papers upon which Judge Coxe's contempt order was based discloses that the appellant did not "put in issue", either his alleged misconduct or the amount of damages. True, at the conclusion of his affidavit, he asserted, by way of legal conclusion, that he was not guilty but a reading of the moving papers and the minutes and the affidavit in opposition and

all documents submitted to Judge Coxe would make crystalline that there was no issue. The appellant never denied that he had deliberately refused to take the stand and that he had violated the order of Judge Medina. Indeed, his prior attorney announced that he was pursuing that course according to plan. His thought was that the Circuit Court had, in effect, instructed the appellant to disobey the order, be punished for a contempt and in that way present a proper appeal. Of course the Circuit Court neither said nor indicated any such thing. It was merely discussing the authorities and ruled that an appeal did not then lie from the order of Judge Medina.

So far as the amount of the fine is concerned it was most conservative. It was minimal. Once again, if papers had been printed in this record, it would have become apparent that the amount of the fine was justified and was indeed inescapable mathematically.

Respecting the matter of the hearing under Rule 16, it should be pointed out that the appellant declined to appear before Judge Coxe at any time. When the matter was adjourned to the Chambers of Judge Coxe both counsel for the respondent and the Court asked for the appellant. He did not want a hearing. He absented himself purposefully so that he would not be compelled to take the stand. Had he done so the Court would probably have elicited the very information that the appellant was striving to conceal. The appellant protests, with tongue in cheek, that he was deprived of constitutional rights. It was impossible to drag him into court.

Respecting the order of Judge Medina, it has already been pointed out that the Circuit Court ruled that it was

not appealable. Here, too, the papers upon which the order was based are not printed. However, if the Court will examine folio 213 of the Record, it will find that all of the arguments and all of the contentions now relied upon by the appellant were regularly submitted to Judge Medina and considered by him.

Finally, in that connection, may we discuss briefly the nature of the judgment. The appellant does not seem to recognize that this was not a judgment for a sum of money and that accordingly Article 45 of the New York Civil Practice Act dealing with proceedings supplementary to execution is wholly inapplicable. The section of the law upon which Judge Medina acted is Section 293 of the Civil Practice Act which reads:

> "Sec. 293. *Order for taking testimony during the trial or after judgment.*
>
> Upon motion, made upon notice and upon proof of facts and circumstances which render proper the taking of testimony by deposition during the trial of the action, or after judgment in order to carry the judgment into effect, the taking thereof may be ordered by the court."

That section is in a different article altogether.

CONCLUSION

The petition for certiorari should be denied.

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Impleaded Appellee.